COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	DATE FILED: April 17, 2017 11:41 AM FILING ID: 6574C747965DE CASE NUMBER: 2016SC112
On Certiorari to the Court of Appeals Court of Appeals Case No. 2014CA1816 _____ **Petitioner:** JANE E. NORTON, v. **Respondents:** ROCKY MOUNTAIN PLANNED PARENTHOOD, INC. a/k/a PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, INC., a Colorado nonprofit corporation; JOHN W. HICKENLOOPER, in his official capacity as Governor of the State of Colorado; SUSAN E. BIRCH, in her official capacity as Executive Director of the Colorado Department of Health Care Policy and Financing; and LARRY WOLK, in his official capacity as Executive Director of the Colorado Department of Public Health & Environment.	
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PETITIONER'S REPLY BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or 28.1 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or 28.1(g) in that it contains **4,130** words (reply brief may not exceed 5.700 words).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1 and C.A.R. 32.

COLORADO FREEDOM INSTITUTE

s/ *Michael J. Norton*
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I. INTRODUCTION

This case is about following the plain language of the Colorado Constitution even when it involves a controversial subject where citizens have dramatically divergent views. Article V, Section 50 prohibits the use of any public funds "to pay or otherwise reimburse, *either directly or indirectly*, any person, agency, or facility for the performance of any induced abortion…" (emphasis added).

This citizen-sponsored initiative contains an intentionally broad prohibition. The court of appeals erred by interpreting this broad prohibition to be limited to expenditures only to the extent the State's specified purpose was to pay for an induced abortion. The Colorado voters who adopted Article V, Section 50 in 1984 did so on the basis that "taxpayers are not required to subsidize abortions." *See Analysis of 1984 Ballot Proposals,* Colorado General Assembly's Legislative Council at 6. CD, pp. 99-100.

Ultimately, the court of appeals' invention of this "purpose" requirement renders the clear Constitutional restriction on funding of induced abortions "indirectly" meaningless and void. The lower court's holding gives license to public expenditures that, based on the overall facts and circumstances in a specific case, indirectly subsidize induced abortions so long as such expenditures appear to have a benign purpose ascribed to them.

Defendants ask this Court to jump the procedural gun and throw Plaintiff's[1] case out of court based on factual claims they make in their C.R.C.P. 12(b)(5) motions to dismiss that have not been proven or even subjected to discovery, as no Defendant has yet filed any Answer in response to the allegations of Plaintiff's Complaint and no discovery was conducted. Defendants seek to deny Plaintiff her day in court because it may be challenging or even difficult, in theory, to define the precise limits of what is prohibited by Article V, Section 50.

But that is not the question in this case. The question is whether the allegations of Plaintiff's Complaint, taken as true as must be the case, state a claim that the State has violated the constitutional restriction on the use of public funds "to pay or otherwise reimburse, *either directly or indirectly*, . . . for the performance of any induced abortion." Line drawing concerns or questions are irrelevant when the lower courts have dismissed the claim outright.

Plaintiff properly alleged facts in her Complaint showing indirect funding of elective abortions using State Taxpayer Funds. Moreover, given the 2001 factual determination and legal analysis made by the Colorado Department of Public Health and Environment ("CDPHE") in 2001 – a determination that had never before made by the State government prior to 2001 and was ignored by the State Defendants after 2007 – Plaintiff's Complaint plainly and clearly alleged that the State Defendants

[1] Petitioner Jane E. Norton is referred to herein as "Petitioner" or "Plaintiff."

intentionally or knowingly paid, and Planned Parenthood intentionally or knowingly received and used, State taxpayer funds to subsidize induced abortions. The court of appeals and trial court decisions dismissing the Complaint should be reversed.

II. ARGUMENT

A. It Was Error to Dismiss Petitioner's Allegations that the State Defendants Intentionally Violated Article V, Section 50.

Petitioner's Complaint alleged that the State Defendants, in concert with Planned Parenthood, did that which Article V, Section 50 prohibits, *i.e.*, they knowingly use State Taxpayer Funds to subsidize induced abortions being performed by Planned Parenthood's inextricably intertwined abortion affiliate. That the State has violated the clear prohibitions of Article V, Section 50 for several years is no excuse. Whether enforced or not, it is still the law in the State of Colorado. CD, pp. 4-6, 30, ¶¶ 21, 22, pp. 229, 230, 236, 237, 241, 251, 252, 282-284, 307-310; DC-Transcript pp. 29-30, line 25 to line 21.

1. The State knowingly paid State Taxpayer Funds to subsidize the performance of induced abortions.

Petitioner's Complaint alleges a detailed scheme where Planned Parenthood simply divides its operations into co-located two non-profit entities, "Rocky Mountain Planned Parenthood" ("Planned Parenthood") and "Planned Parenthood of the Rocky Mountains Services Corporation" ("Planned Parenthood Services Corporation"). The Complaint alleged that the two entities:

> [H]ave been conjoined, interrelated, and integrated affiliates or entities of each other and occupy the same office space, utilize the same medical professional and lay staff, utilize the same medical supplies and services, utilize the same office supplies and services, utilize the same utilities…

Compl. ¶ 12. Plaintiff's Complaint lays out how such interrelated activities make any payments to Planned Parenthood amount to a subsidy of Planned Parenthood Services Corporation, which is the artificially distinct entity that performs countless elective abortions. Compl. ¶ 17.

The State, joined by Planned Parenthood, counters that Plaintiff's Complaint did not claim the State directly paid Planned Parenthood for abortions, but only that payments to one Planned Parenthood entity invariably subsidized the elective abortions of the other Planned Parenthood entity. Ans. Br. at 4-5. Defendants either ignore or misunderstand the concept of *paying for* an abortion and fail to account for the appreciably broader Constitutional language which bans use of public funds to "pay or otherwise reimburse [for induced abortions], either directly or indirectly…". Article V, Section 50.

It is noteworthy that Defendants do not dispute that State Taxpayer Funds were, in fact, paid to Planned Parenthood, although they assert that such payments cannot be deemed to be in violation of Article V, Section 50. As was well-known to the State Defendants and as Petitioner's Complaint alleged, Planned Parenthood's abortion affiliate has, since the 2007 resumption of the payment of State Taxpayer

Funds to Planned Parenthood, continued to utilize, without fair market reimbursement, Planned Parenthood's building and medical facilities, Planned Parenthood's medical equipment and supplies, and Planned Parenthood's medical staff and personnel to perform induced abortions. Thus, Planned Parenthood, using State Taxpayer Funds, has continued to subsidize Planned Parenthood Services Corporation and thus the performance of induced abortions, all in violation of Article V, Section 50. CD, pp. 29, ¶13, 30, ¶¶ 20-22, 33, ¶34.

The factual allegations of Petitioner's Complaint do not therefore present an attenuated, hypothetical absurdity about which Defendants seem to be concerned. Rather, Plaintiff's Complaint alleged a factual scenario whereby the State Defendants intentionally and knowingly paid State Taxpayer Funds to Planned Parenthood which, in turn, subsidized abortions performed by Planned Parenthood Services Corporation and which, as Defendants effectively acknowledge, amount to "payments for abortions through an intermediary are forbidden [by the Amendment] along with direct payments." *See* State Defendants' Answer Brief at 9.

In other words, payments of State Taxpayer Funds to by Planned Parenthood subsidize abortions performed by its closely related shell corporation affiliate, *i.e.*, Planned Parenthood Services Corporation, which uses, without fair market value reimbursement, the building and facilities, medical and other personnel, medical and other equipment and supplies owned by Planned Parenthood are, Plaintiff's

Complaint alleged, knowingly and intentionally used to subsidize abortions performed by the abortion affiliate.

2. The intent of the State Defendants in funding Planned Parenthood was a fact question to be decided by a jury.

The courts below failed to appreciate the role intent plays in the interpretation and application of Article V, Section 50. In addition to an analysis of the facts and circumstances in a specific case, the element of intent is an important part of the question of whether, as Petitioner's Complaint alleged, the State Defendants knowingly paid State Taxpayer Funds that would be used to subsidize abortions. The finding of intent is a factual determination which, as with the other facts alleged in Petitioner's Complaint, is committed to the fact-finder. *See, e.g. Polemi v. Wells*, 759 P.2d 796, 798 (Colo.App.1988)(intent as jury issue).

The court of appeals, in *Keim v. Douglas County School District,* 2015 COA 61 (Colo.App.2015),[2] faced a similar analysis regarding the meaning of the words "directly" and "indirectly" and issue of intent. The court of appeals stated that "Accordingly, in our view, the phrase 'given, directly or indirectly, to a candidate for the purpose of promoting the candidate's ... election' requires that (1) a thing of value (2) be put into the possession of or provided to a candidate or someone acting on the candidate's behalf (3) with the **intention** that the candidate receive or make

[2] Currently on appeal to the Colorado Supreme Court from the court of appeals. Case No. 2015SC502.

use of the thing of value provided (4) in order to promote the candidate's election." 2015 COA 61, ¶ 39 (emphasis added).

Thus, factual issues are presented by the allegations of Petitioner's Complaint which are relevant to whether Article V, Section 50 has been violated. Where the facts determined by the fact-finder demonstrate that the organizational and operational arrangement between an intermediary and its affiliate is so closely interconnected that payment of State Taxpayer Funds to the intermediary amounts to payment of State Taxpayer Funds to its affiliate, particularly when those arrangements are known to and ignored by the State Defendants, the fact-finder may easily conclude that Article V, Section 50 has been violated and violated intentionally.

What would be an absurd interpretation and application of Article V, Section 50 would be a factual scenario, as alleged in Petitioner's Complaint, wherein the State Defendants could pay State Taxpayer Funds to an intermediary, *i.e.*, Planned Parenthood, knowing that such funds were then being filtered to its closely-related shell entity, *i.e.*, Planned Parenthood Services Corporation, that is alleged to own no assets and has no real economic substance or independent existence apart from the intermediary and that such State Taxpayer Funds were thus subsidizing abortions. Such an interpretation must be rejected by this Court. *See Bolt v. Arapahoe County Sch. Dist. No. Six*, 898 P.2d 525, 532 (Colo.1995)("Any interpretation [of a

constitutional provision] which results in an unreasonable or absurd result should be avoided.").

The courts below pulled out most of the "teeth" Coloradans included in Article V, Section 50, and, if that result is not corrected by this Court, they will also have pulled the "wool over the eyes" of Coloradans and will have provided a roadmap to Planned Parenthood and other organizations on how to circumvent constitutional or statutory prohibitions on the expenditure of State Taxpayer Funds.

3. Any "Facts" Argued in Defendants' Answer Briefs At Variance from Those Facts Alleged in Petitioner's Complaint Must be Disregarded by this Court.

Neither the State Defendants nor Planned Parenthood expressed, in their answer briefs, directly-stated disagreement with Petitioner's statement of the case and facts. See C.A.R. 28(b). Even so, each of the Defendants' answer briefs sets forth extensive recitations of "facts," including many "facts" not alleged in Petitioner's Complaint, which Defendants appear to want, though improperly so, this Court to consider. *See, e.g.*, State Defendants' Answer Brief at 1-5; Planned Parenthood's Answer Brief at 1-9.

Importantly, however, Petitioner's Complaint was dismissed by the district court pursuant to C.R.C.P. 12(b)(5) before any answer was filed by any Defendant and before any discovery had been conducted. Therefore, the district court (and the court of appeals) was required to consider only the factual allegations of Petitioner's

Complaint. It was improper to consider bare, unproven factual allegations beyond the confines of that pleading. *Medina v. State,* 35 P.3d 443, 452 (Colo.2001); *Dunlap v. Colorado Springs Cablevision, Inc.,* 829 P.2d 1286, 1290 (Colo.1992); *McDonald v. Lakewood Country Club*, 461 P.2d 437, 440 (Colo.1969). *See also In re Eilertsen*, 2003 WL 1960351 (Bkrtcy.D.Colo.2003) (citing *Morgan v. City of Rawlins,* 792 F.2d 975, 978 (10thCir.1986))(dismissal "prior to allowing the parties an opportunity to engage in discovery and develop a more complete understanding of the facts and circumstances surrounding the issues raised in an action is a 'harsh remedy which must be cautiously studied, not only to effectuate the rules of pleading but also to protect the interests of justice.'").

As there are no "facts" or any "evidence" before this Court beyond the factual allegations of Petitioner's Complaint, the factual allegations in Petitioner's Complaint, as described in the summary of facts set forth in Petitioner's Opening Brief, should have been accepted by the courts below and must be accepted by this Court. Any contrary facts in Defendants' answer briefs must be disregarded. *See Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1099 (Colo.1995)(In the context of a motion to dismiss, courts "accept all averments of material fact contained in the complaint as true.").

4. This Case is About Whether the State Currently Violates Article V, Section 50; CDPHE's changing views add context.

What Plaintiff challenges in her Complaint is the post-2007 practice of the State Defendants in paying State Taxpayer Funds to Planned Parenthood to subsidize induced abortions. The State Defendants mischaracterize CDPHE's 2002 to 2007 policy regarding the Amendment as Petitioner's "view." However, this "view" was not a personal belief held only by Petitioner. It was, as Petitioner's Complaint alleges, the official position of CDPHE and the Administration of then-Governor Bill Owens regarding the application of the Amendment to the specific facts and circumstances determined by CDPHE in 2001 to exist regarding the interconnected, alter ego relationship between Planned Parenthood and its abortion affiliate Planned Parenthood Services Corporation.

CDPHE determined that the payment of State Taxpayer Funds to Planned Parenthood subsidized abortions performed by Planned Parenthood Services Corporation. This determination followed an intensive legal and factual analysis of the relationship between Planned Parenthood and its abortion affiliate.

As alleged in Plaintiff's Complaint, it included the audit of this relationship by an independent accounting firm. This independent accounting firm determined that, because the abortion affiliate was co-located with Planned Parenthood, but was not reimbursing Planned Parenthood the fair market value for Planned Parenthood's assets it used to perform abortions, State Taxpayer Funds were paid to Planned

Parenthood to subsidize abortions in violation of the Amendment. The fact that CDPHE previously concluded that Planned Parenthood's particular structure and practices in Colorado create an unavoidable subsidization problem is strong evidence that Plaintiff's Complaint has alleged a viable theory upon which relief may be granted.

B. Petitioner's Interpretation of Article V, Section 50 has Sound Limits for Future Cases to Develop.

In an attempt to deflect Petitioner's sound claim against subsidizing induced abortions under the particular and unusual facts alleged in Petitioner's Complaint, Defendants suggest there would be no "meaningful limits" to the application of the Amendment if Petitioner's view were to be adopted. That is simply not so.

First, Petitioner provides a workable interpretation of Article V, Section 50 that would simply allow plaintiffs with standing to challenge factual circumstances where State Taxpayer Funds either were used directly for abortions, or were used indirectly for abortions. Petitioner's Complaint alleged a theory of indirect subsidization of abortion, given the detailed and particular facts about Planned Parenthood operating two co-located and intermingled entities. Without the specific factual allegations in Petitioner's Complaint, to be proved through litigation, of the relationship between these two Planned Parenthood entities, Defendants could be correct that there would be no case here.

However, Petitioner's Complaint does not pose, as suggested by Defendants, a hypothetical and attenuated absurdity. Petitioner's Complaint does not contend that a violation of Article V, Section 50 would occur if State Taxpayer Funds were paid by the State Defendants to a "service provider" which, in a subsequent, independent, and unrelated transaction, were then paid to another separate and unrelated entity for an abortion. *See, e.g.*, State Defendants' Answer Brief at 10, 13. This is not what Petitioner's Complaint alleges. Indeed, Petitioner's Complaint is more consistent with this the facts set forth in Colorado Attorney General Opinion AGO 85-2. This opinion stands for the proposition that when the State pays funds to a State-created insurance plan that included abortion coverage, the Amendment is violated. This strongly supports Petitioner's view of Article V, Section 50.

Petitioner's Complaint did not pose a hypothetical, attenuated absurdity. It did not allege that there had been State Taxpayer Funds paid to one entity that later and in an independent and unrelated decision paid a separate and unrelated entity for an induced abortion. Rather, Petitioner's Complaint alleged that in 2001, CDPHE, with the legal guidance and support of CDPHE's then-legal counsel who now serves as Colorado's Attorney General, engaged in a detailed factual inquiry, including an analysis of the interrelationship between Planned Parenthood and its abortion affiliate by an independent public accounting firm, factually determined that Planned Parenthood and its abortion affiliate were co-located in space owned by Planned

Parenthood; that Planned Parenthood, without fair market reimbursement by the abortion affiliate, provided its abortion affiliate with medical and office space, medical and office equipment and supplies, and medical and administrative personnel to enable its abortion affiliate to perform induced abortions.[3] CDPHE concluded that, under these facts and circumstances, the Amendment, which, for political reasons, had been ignored in previous years, was being violated.

CDPHE's 2001 detailed factual inquiry determined that, though Planned Parenthood and its abortion affiliate were each separate Colorado corporations, Planned Parenthood and its abortion affiliate operated as a unified entity so that the purported "separation" was a sham. Petitioner's Complaint further alleged that, when Planned Parenthood refused CDPHE's request to separate its operations from the operations of its abortion affiliate, CDPHE, on the authority of the Amendment, suspended payment of State Taxpayer Funds to Planned Parenthood.

Petitioner presents a sound theory fitting within the four squares of prohibition of Article V, Section 50. Are there facts and circumstances in this specific case that demonstrate that the organizational and operational arrangement between the

[3] Petitioner's Complaint does not allege that Planned Parenthood performs abortions. However, it now appears likely that Planned Parenthood itself does perform abortions. *See* attached Exhibit A. Upon remand, discovery would help resolve this issue.

intermediary and the affiliate is so closely interconnected that payment of State Taxpayer Funds to the intermediary amounts to payment of State Taxpayer Funds to the affiliate performing abortions? Yes, and Plaintiff has alleged the necessary facts in her Complaint to prove an Article V, Section 50 violation.

This is a unique situation where the facts alleged in a complaint have been pre-vetted by a State Agency which conducted a detailed, on-point audit. The fact-intensive inquiry that CDPHE made in 2001 which led to CDPHE's 2002 to 2007 defunding policy is the same type of fact-intensive inquiry which a court is well-equipped, following discovery, to determine.

If such facts, circumstances, and intent as alleged in Petitioner's Complaint are found to exist, the Amendment has been violated even though the specific "purpose" of the expenditure, from the perspective of an outsider, is not to "directly" pay for an abortion. A court can therefore easily determine that no hypothetical, attenuated absurdity is presented by the facts alleged in Petitioner's Complaint.

That is just the factual scenario presented by Colorado Attorney General Opinion AGO 85-2 ("Given the broad language of the amendment and the method of financing and administering state employee health insurance programs, the inclusion of coverage for induced abortions in the health care benefits provided by the state to its employees appears to be proscribed. . . . Premiums are paid by the state to the HMO which, in turn, pays the medical provider. Although the funds used to pay or

reimburse such provider would not be directly traceable to the group insurance reserve fund or the state contributions deposited therein, "indirect" use of public funds for abortions is specifically prohibited by the amendment.").

Even worse, accepting defendants' view would result in an absurdity and create a clear roadmap for others to engage in similar shell games to avoid the application of the Amendment. If the letter and intent of the Amendment, and particularly the word "indirectly," are to have any meaning, this Court must reverse the decision of the court of appeals affirming the C.R.C.P. 12(b)(5) dismissal of Petitioner's Complaint and remand this case to the district court for further proceedings, including discovery.

C. This Case Challenges the Use of State Taxpayer Funds to Subsidize Abortion; the Medicaid Free Choice of Provider Concept is a Red Herring.

Petitioner's Complaint alleges that the State Defendants paid Planned Parenthood State Taxpayer Funds of $14 million to indirectly pay for induced abortions in violation of the Amendment. As there has been no discovery in this case, Petitioner's factual allegations as to the use of these allegations must be accepted as true. *See Rosenthal,* 908 P.2d at 1099. Nevertheless, seeking to inject new facts into the case without having filed any answers or without any discovery having been conducted, the State Defendants admit that they paid Planned Parenthood about $1.4 million of State Taxpayer Funds which subsidized induced abortions. The State Defendants, joined by Planned Parenthood, claim that the balance, *i.e.*, $12.6 million, constituted

the State's required federal Medicaid match and that the application of the Amendment to these funds would implicate the so-called "free choice of provider" concept. *See, e.g.,* State Defendants' Answer Brief at 28 to 32.[4]

However, because it was not even referenced in Petitioner's Complaint, this "free-choice-of-provider" concept was simply not properly before either lower court. Indeed, counsel for Planned Parenthood raised this same argument at the court of appeals oral argument. However, the court of appeals, as should this Court, found it unnecessary to even address this argument in its opinion.

Taking the factual allegations of Petitioner's Complaint as alleged, it must be assumed that that the State Defendants paid Planned Parenthood State Taxpayer Funds of $14 million in violation of the Amendment. Beyond the allegations of Petitioner's Complaint, it has simply not been factually determined whether and, if so, how much in State Taxpayer Funds were funneled to Planned Parenthood or for what purposes. Because there is, at this pleading stage, no dispute that the State Defendants are paying *some* State Taxpayer Funds to Planned Parenthood and no dispute that Planned Parenthood subsidizes its abortion performing affiliate, the

[4] The "free-choice-of-provider" concept stands for the proposition that an individual Medicaid recipient is free to choose any provider so long as: (1) the provider is "qualified to perform the service or services required," and (2) the provider "undertakes to provide [the Medicaid recipient] such services." 42 U.S.C. § 1396a(a)(23). This concept may be a relevant legal issue at a later stage in this case, but it is not so now.

question of how much, if any, State funds implicate Medicaid does nothing to support dismissing this case outright.

In other words, even assuming Defendant's argument is correct, it would not justify dismissing Petitioner's Complaint which affirmatively and factually alleges that State Taxpayer Funds were used to subsidize abortions. The trial court judge would no doubt be given ample opportunity to explore the Medicaid "free choice of provider" arguments at the proper stage of this case and, if should become necessary, tailor appropriate relief to avoid this concern at that stage.

While other federal circuits have opined on state efforts to reduce or eliminate the state Medicaid match going to Planned Parenthood, the Tenth Circuit is not one of them. Thus, whether Colorado may limit payment of its Medicaid match to Planned Parenthood or other abortion providers is an unresolved issue in the Tenth Circuit.

Finally, to the extent Defendants' attempt to inject "facts" not included in Petitioner's Complaint at this stage of the case, such attempts must be rejected. It is unknown at this stage whether $12.6 million was, as defendants claim, federal funds managed by the State of Colorado, State Taxpayer Funds constituting the State's federal Medicaid match, or something else.

III. CONCLUSION

Petitioner's Complaint alleges that the State Defendants paid $14 million in State Taxpayer Funds to Planned Parenthood knowing such funds subsidized abortions

performed by Planned Parenthood's abortion affiliate Planned Parenthood Services Corporation. Though the direct "*purpose*" of the expenditure of State Taxpayer Funds may have been catalogued by the State Defendants as something else, the indirect "*purpose*" of the expenditure of State Taxpayer Funds was to knowingly and intentionally subsidize abortions. That is what Petitioner's Complaint factually alleged; there are no contrary facts before this Court.

This Court should reverse the judgment of the court of appeals and remand this case to that court with instructions to return the case to the district court for further proceedings.

Dated this 17th day of April, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 17th day of April, 2017, a true and correct copy of the foregoing ***Petitioner's Omnibus Reply Brief*** was served on the following parties or their counsel electronically via ICCES to:

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